United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF ON BEHALF OF APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA

APRIL TERM, 1944

161

No. 8649

MONROE D. NEELY, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

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Attorneys for Appellee.

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JURISDICTIONAL STATEMENT

This is an appeal from a judgment of conviction in the District Court of the United States for the District of Columbia on an indictment charging appellant with murder in the first degree.

On June 21, 1943, an indictment was filed in the District Court of the United States for the District of Columbia charging Monroe D. Neely with murder in the first degree. On June 25, the appellant entered a plea of not guilty and on September 8, William J. Kelly, Esquire, entered his appearance on behalf of the appellant. On November 16, 1943, the appellant was again arraigned in the presence of his attorney and entered a plea of not guilty. A jury was sworn and the trial commenced and on November 19 the jury returned a verdict of guilty of murder in the first degree. On November 22 a motion for a

new trial was filed and on December 3 the motion was argued and denied. A sentence of death was imposed and on December 8, 1943, appellant filed his notice of appeal.

Jurisdiction of the District Court over all crimes and offenses committed within the District of Columbia is established under the D. C. Code (1940) Section 11–306. This Court acquires jurisdiction to review the present cause by virtue of the D. C. Code (1940) Section 17–101, which provides for an appeal from any final judgment of the District Court.

STATEMENT OF THE CASE

The following statement has been agreed upon by the parties for the convenience of the Court as a fair statement of what took place in the trial court, but is not intended to be all inclusive of what transpired there. For matters of detail the Court is referred to the transcript which has been made a part of the record on appeal.

The above entitled cause came on for trial on Tuesday, December 16, 1943, at 2 o'clock p. m., before Associate Justice David A. Pine, in Criminal Division No. 2. The Government was represented by John L. Ingoldsby, Jr., Assistant United States Attorney, and the defendant was represented by William J. Kelly, Esquire, and J. Carroll Hayes, Esquire. The Court noted that the defendant had his previous arraignment without counsel and at the suggestion of the Court, the defendant was arraigned again with counsel present and pleaded not guilty. Counsel indicated that no motion to quash or other preliminary motion would be filed and that the defendant was ready for trial. Thereupon, a jury satisfactory to both sides was selected before peremptory challenges for either side had been exhausted.

Thereupon, the attorney for the government made an opening statement to the jury, summarizing the evidence the government expected to introduce. Defendant's counsel immediately thereafter made an opening statement on behalf of the defendant. Thereupon, the government proceeded to call its witnesses, and the following named persons after being first duly sworn testified as indicated:

Dr. ARNOLD HENRY GOULD testified that he was attached to Gallinger Hospital on May 8, 1943, and on that date the defendant, Monroe D. Neely, was brought into Gallinger Hospital with lacerations on the scalp and one or two fingers and possible fracture of the skull. Upon examination there proved to be no fracture and the lacerations were bound up. This was approximately 7:30 or 8 o'clock in the evening and the defendant remained at the hospital only about twenty minutes, and was released from the hospital after treatment. On cross-examination the doctor testified that the defendant was in custody of the police at the time he was brought to Gallinger Hospital, and that the only history he had of the case was that the man had fallen down the steps. The defendant was conscious at the time and stated to witness that he found somebody with his wife and grabbed a gun and started shooting.

Thereupon LEOLA NEELY was called as a witness for the government and after being first duly sworn testified that she was the legally married wife of the defendant and lived at 617 21st Street NE. Thereupon the Court asked the witness whether she had received a subpoena to appear in court and give testimony and witness answered that that was correct. The Court thereupon advised the witness that she was competent to testify but could not be compelled to testify for or against her husband. The witness stated that she did wish to testify. Thereupon counsel approached the bench. In the discussion which followed the Assistant United States Attorney stated what the witness could testify to, which briefly was that she and her husband had words and her husband shot her and what she said to one Charles Brown, a colored policeman who lived at the same house, when he came up the steps to the apartment where the shooting happened and the witness told him not to come, and Brown then left and notified the police who later did appear. Objection was made by attorneys for the defendant to all this proposed testimony. The Court ruled that conversations and words between the witness and her husband were confidential and would not be received in evidence. The Court further ruled, over the objection of the attorneys for the defendant, that the actual shooting of the wife and her statement to Charles Brown would be received in evidence for

the limited purpose of showing why the police officers arrived at the scene. The Court stated that he would instruct the jury of this limited purpose either at that time or at the close of the case with his other instructions. By agreement, it was understood such instructions would be given at the close of the case.

Thereupon, the witness Leola Neely testified in the hearing of the jury that she was living with her husband on the 8th day of May, 1943, at 617 21st Street; that they rented a back room in the south side of the house; that she was acquainted with Charles Brown, who also lived in that house; that she saw him all that day; that around noontime her husband went out and came back with a fifth of Schenley whiskey and she saw him take some drinks; that they had been happy all morning and had a friendly conversation; that around 4 o'clock the defendant shot her; that she was getting ready to take some medicine and after she took a pill he shot her, and after the first shot she grabbed hold and fell. As she lay on the floor she said that through the mirror she saw Brown running up the steps and he got to the top landing when she called to him "Don't" and "Don't come in." Witness further testified that the first shot struck her in the chest and the second in the temple. Witness then testified that marks on her left jaw and temple were from the shooting. After some testimony regarding these injuries counsel for the defendant objected to further testimony in view of the limited purpose of the evidence, which objection was sustained. Witness testified that she was not intimate with Charles Brown and described how she was dressed the day of the shooting.

On cross-examination the witness testified that the defendant got some whiskey shortly after they got up and after that the defendant did not leave the house any more. He stayed around the house and around the bedroom and took down storm windows. Charles A. Brown helped him take the storm windows down and they were very friendly. Brown's wife was not living at the house and witness does not know where his wife is. Brown's mother lived there; that she is 75 years old; that she was around there all that day helping with the house work. Witness and her husband did not have

any words that day, but everything was very friendly. Witness does not know where Charles Brown worked, but she knew he was on the police force; that she never saw his gun around; that his gun was not in her room at any time that day; that he always kept his gun concealed; that her husband went in Brown's room that day to get the gun and that was the only time. This was a little after 4 o'clock. Brown was outside watering the lawn or on the porch somewhere. Mrs. Brown was downstairs in the kitchen putting clean papers in the shelves. After she got through eating witness came back upstairs, straightened up the bedroom. Her relations with her husband had been friendly all that day. He had never accused her of going around with Brown.

Thereupon Dr. CHRISTOPHER J. MURPHY, Deputy Coroner of the District of Columbia, testified that he performed an autopsy at the District of Columbia Morgue on May 9, 1943, at 12 o'clock noon on the body of a person identified to him as Charles Johnston, a white man about 24 years of age, weighing 182 pounds, 5′ 8″ in height. He had two gunshot wounds in his head. There were no carbon marks on either wound. The upper bullet passed completely through the brain and lodged in the back part of the head, and the other bullet lodged in the front part of the head. Witnesses could not state whether the two wounds were caused by one bullet which split or by two separate bullets. Witness identified one piece of lead by a mark on it and stated that he could testify that he took that out of the brains of the deceased. Witness further testified that he took another bullet from the frontal lobe. Witness finally testified that what he took out was two pieces of lead. On further examination the witness testified that there was one wound above the bridge of the nose in the midline, and the other wound was three and one-half inches above that.

Thereupon IRA M. GULLICKSON testified that he was chief photographer and document examiner of the Metropolitan Police Department and that late on the afternoon of May 8, 1943, he took ten photographs at premises at 617 21st street, N.E., and two others about the 12th day of May. (These pictures were later used in the trial by agreement of counsel.)

CHARLES ALDON BROWN testified that his address is 617 21st Street NE., and that was his address on May 8, 1943; that his occupation on that date was policeman; that he had been a member of the Metropolitan Police Department for six months and was known as a probationary officer. Witness was in police uniform during the first seven weeks of his service, but thereafter he was assigned to undercover work and did not wear a police uniform. Witness was then shown a gun which he testified was the gun assigned to him. Witness testified that on the 8th day of May he was at his home, both in the morning and in the afternoon. In the afternoon he was working on the front porch. Witnesses left the house at about 11:30 a. m., and came back at 4: 10 or 4: 15. He was dressed in green trousers, a sport shirt and a lumber jacket. At no time that day did he wear a police uniform. Witness was cleaning porch furniture on the front porch, and had been there a half hour or 45 minutes when he heard a shot. He ran in the house and as he got in the house he met his grandmother coming out of the dining room, where she had been ironing. Witness heard a groan up the stairs and ran up the steps and saw Mrs. Neely lying between the two beds. She could see witness in the mirror and hollered, "Don't come in here. Neely shot me." Witness sent his grandmother out of the house, out the back way and witness went out the front way and got to a telephone and called the police at No. 9 Precinct. Witness further testified that he kept his gun in a holster on the dresser in his bedroom and that the defendant had visited his room.

On cross-examination the witness testified that when he got back from work at 4:10 or 4:15 that morning, he put his gun on the top of the dresser in his room. Witness testified that there was a telephone in witness' bedroom on the second floor and also one in the dining room on the first floor. Witness testified that he had no trouble with the defendant that day and their relations were very good. After he heard the shot he ran up the stairs and saw Mrs. Neely lying half way on the bed and floor as though she were propped up between the beds. Witness did not see the defendant. Defendant at no time accused witness that day of being intimate with his wife. When witness saw Mrs. Neely propped against the bed, he did not

enter the room. Witness had left his gun in his room a half hour before he heard the shots. After the shooting he went to a neighbor's house and phoned from there. He did not attempt to use the phone in his own house. When Officer Johnston came, witness was in front of the house. He told Officer Johnston that a man who lived on the second floor had shot his wife and not to go in there.

On redirect examination witness said he was prevented from going into the house again until the officers from the Detective Bureau arrived. Thereupon the following occurred: (Redirect examination by Assistant United States Attorney)

> Q. With respect to this mirror in the Neely room; do you recall one day several weeks ago when Sergeant Thompson and myself went out to this house?
>
> A. I do.
>
> Q. And you were there?
>
> A. Yes, sir.
>
> Q. And do you recall Mrs. Neely demonstrating just how she saw you come to the head of the stairs?
>
> A. Yes, sir.
>
> Q. Did you look into that mirror to see if it was possible to see me at the head of the stairs?
>
> A. Yes, sir.

Thereupon, at this point counsel for the defendant objected to this line of examination about something that happened in the absence of the defendant and moved to strike the testimony. The objection was overruled and an exception noted, and the Court stated that counsel for the defendant might ask other questions as he saw fit. Thereupon, the Assistant United States Attorney asked:

> Q. At the time you looked in this mirror from the position as described by Mrs. Neely, could you see——

Whereupon, the attorney for the defendant again objected. The Assistant United States Attorney did not further pursue this inquiry.

SAMUEL JOHNSTON testified that he was the father of Charles R. Johnston and identified the body of his son at the Morgue in the presence of the Assistant Coroner.

ROBERT AUSTIN MAXWELL testified that he was employed at the office of the Coroner for the District of Columbia, and identified the body of the deceased, Charles R. Johnston, to Dr. Murphy, Deputy Coroner, who later performed the autopsy.

RICHARD T. WHITE testified that he was a police officer on duty on May 8, 1943, in a scout car with Officer Arthur F. Trammelle; that at 5:26 p. m., that date a call was received over the radio in the scout car to go to premises 617 21st Street NE., on account of a shooting. They drove up to the house and saw Officer Johnston standing there and went to the house and took out their guns and went up to the front door, and just as they went through the door there was a shot. They got to the bottom of the stairs alongside of the railing and had their guns in their right hands and they had to look over the bannister to look upstairs, and they called up the stairs "Throw your gun down the steps"; that a voice at the top of the steps said, "If you want me, coppers, come up and get me." Officer Johnston looked around the bannister and at the same time put his gun in his right hand, and just as he did a shot rang out and he fell to the floor in front of the witness. The witness fired two shots up and said, "Throw your guns down," and a voice said "If you want me, coppers, come up and get me." Just then there was another shot and witness fired two more and a voice said, "Coming down," and he threw his gun down and a man came walking backwards with his hands up, who was later identified. Witness testified that when he got into the middle of the room, his partner had to take action to subdue the man to keep him from resisting him; that witness called the ambulance and Officer Johnston was put on a stretcher; that they saw a policeman's cap in the closet; that another man came in and claimed the hat; that they went upstairs and there was a woman lying on the floor in a pool of blood; that Officer Johnston fired a shot; that he did not know whether it was a reaction or not but he jumped down and his, Johnston's, gun went off; that a shot came downstairs and struck Officer Johnston; that at the time Officer Johnston was shot he heard one shot; that he was shown badge No. 199 and identified it as Officer Johnston's. Witness identified Smith and Wesson gun as Officer Johnston's;

identified six shells and gun used by Neely. Witness never heard defendant make any statement when he came downstairs.

On cross-examination witness testified that he did not see Officer Brown at the time he arrived but saw him later on. Witness identified a hole in the ceiling from Government Exhibit No. 4 made by Officer Johnston's gun. Witness stated that Johnston and Neely fired almost simultaneously. After Johnston fell to the floor he, White, fired two shots; that he did not examine Neely's wife; that he heard three shots in the house; that one bullet was still in the gun when it was thrown down the steps by Neely; that witness did not recall if anybody suggested that Neely come down the steps backwards; that witness did not accompany Neely to the hospital.

On redirect examination witness testified that the gun he identified had been in his possession until he put the identification marks on it. At this time Mr. Ingoldsby offered in evidence Government's Exhibits Nos. 14, 15, 16, 17, 18 and 19.

Officer Arthur Trammelle testified on behalf of the government that he was a member of the Metropolitan Police Department on May 8, 1943, attached to No. 9 Precinct; that he received a call at 5:26 to investigate a shooting at 617 21st Street NE.; that when he arrived at the scene Officers White and Johnston went in the front door and he covered the rear door; that he heard several shots and a dull thud; that he returned to the front of the building; that he went in and saw Officer Johnston lying on the floor in front of the door; that about that time a gun fell down the steps and the defendant started down the stairs backwards with his hands in the air; that he ran up the steps, placed the defendant under arrest and a tussle followed. After placing the defendant under arrest, witness went upstairs and saw defendant's wife lying in front of the bureau in a pool of blood. He did not call to Neely to come downstairs. He did not hear Neely make a statement. The Assistant United States Attorney directed witness' attention to Government Exhibit No. 9 and asked the witness: "Did you notice that gun holster on the dresser at the time you first went to the second floor?" Defense counsel objected to this question and the Court held that the question was leading.

Motion was made by defense counsel to withdraw a juror and declare a mistrial, which motion was overruled and exception noted.

On cross-examination Officer Trammelle testified he did not know whether or not the defendant was taken directly to the hospital. He was not present when any statement was taken from the defendant; that he had seen Charles Brown before he went into the house; that Charles Brown did not talk to him or anybody in his presence before he went in the house, nor did he make any statement to him or any other officers that he, Brown, was an officer at that time. He first found out that Brown was an officer when he identified himself after the bodies were taken out of the house.

Whereupon HARVEY WOMBLE was produced as a Government witness, and after being first duly sworn testified that he was a member of the Metropolitan Police Department attached to No. 9 Precinct, and on May 8 he was assigned to a scout car; that at 5:25 p. m., received a call to investigate a shooting at 617 21st Street NE.; that he arrived at the scene as Officer Johnston was going into the house; that he went around to the back of the building to see if he could gain entrance that way; that as he was coming into the kitchen he heard several shots; that he went out and Private Johnston fell to the floor; that he, Womble. did not fire any shots; that he heard officers call to Neely to throw his gun down and come down the steps. Witness testified that Neely came down the steps with his face to the wall and back to the police; that when Neely got to the bottom of the steps, Officer Trammelle and Officer White and the defendant went into a tussle; that witness did not hear him make any statement until after Trammelle and White left; that witness went to the second floor and did not see any gun upstairs.

CHARLES C. CARVER was produced as a witness for the Government, and after being first duly sworn testified that he was a detective sergeant attached to the Homicide Squad; that on the 8th day of May he went to premises 617 21st Street, N.E., around 6 o'clock; that first investigation disclosed that there was a pool of blood in the defendant's room and he got two

bullets that had been discharged out of that room. In the hall bedroom, back, one bullet in the floor, that had come through downstairs. Witness examined Charles Brown's bedroom and found an empty holster, a blackjack, and a shoulder holster on the dresser.

Whereupon the Government rested and counsel for the defendant moved for a directed verdict on the theory that the Government had not made a case of first degree murder against the defendant. Counsel for the Government called the Court's attention to the *Bullock* v. *United States,* 74 App. D. C. 220, case and motion for directed verdict was denied and exception allowed counsel for defendant.

Whereupon MONROE D. NEELY, defendant, was called to the stand by the defense and after being first duly sworn, testified that on the 8th of May, 1943, he was residing at 617 21st Street, NE.; that at that time he worked in the State Restaurant on North Capitol Street, where he was a bus boy; that Leola Neely was his wife and that they were married and living together as man and wife on the 8th day of May, 1943; that on the morning of May 8, he arose from bed and he and the witness Brown were taking off some storm windows and putting some screens in; that about 11: 30 he had his wife call his boss to tell him that Neely would not be at work; that he then went to sleep and arose around 3: 30 and went to work; that as he went out he saw Charles Brown coming in, and told him he was going to work; that he got as far as the drug store and made a purchase and decided to go back home; that when he went upstairs he opened the door to his room and Brown and his wife were in bed and Brown was on top of her; that he looked over to the dresser and the gun was on the dresser and Brown jumped for it, and Neely picked it up and Brown grabbed him and his wife grabbed him; that the three of them tussled over the gun and the gun went off and shot her twice, and when she fell to the floor Brown was trying to get his hands free and with one hand Brown hit Neely and knocked him against the wall and the gun went off again; that Brown then went downstairs and told his mother to go back; that he then went to the bathroom to get some water to wash his wife's wounds, could find nothing

to put water in so he went back to the room, picked his wife up and started down the stairs to call the doctor for her, when a shot came up the stairs and his wife said, "Don't go down there, Brown will shoot you"; that he turned around and someone shot again; that he took his wife back to the room and laid her down and walked back to the steps and said "Hold your fire." "What are you shooting at?" He spoke again and asked what they were shooting at and they did not say anything. Someone shot again and he shot down the steps but could not see anybody. Someone shot up again. He stood there for a few minutes and someone said, "Throw that gun down and come down backwards." He asked who was shooting and they said a policeman and he said, "Why didn't you say police before you shot up here?" And they said "Never mind what we didn't say—throw that gun down and come down backwards"; that he threw the gun down the steps and they said, "Turn around and back down the steps with your hands up"; that he did so and when he got to the bottom somebody hit him on the back of the head. He was knocked out; that he had had no argument with his wife; that he had no argument with Brown up to the time of the shooting; that he thought Brown was shooting up the steps at him; that he thought he was shooting at Brown because Brown had been shooting at him and had intercourse with his wife; that he never meant to shoot his wife; that he got the gun to keep Brown from getting it and did not intend to shoot anybody but was trying to keep Brown from shooting him; that when he came to he was in the hospital; that a policeman hit him in the mouth; that the first time he knew the police were there was when they told him to throw the gun down; that he never attempted to evade arrest; that he lived in the house for nine months previously; that his wife had been living there before he had moved there for about two years altogether; that he was shooting at Policeman Brown he thought.

On cross-examination witness testified that he deliberately fired two shots and that the gun went off unintentionally three times; that the two deliberate shots were fired down the steps; that the first shot went off when he and Brown were fighting for the gun and that hit his wife; that the second shot went off

shortly after that; that all three shots went off while tussling over the gun; that witness never intentionally fired at Brown while Brown was still on the second floor.

Whereupon, the Assistant United States Attorney attempted to question defendant Neely regarding a statement he is alleged to have given to the police, which was not offered by him in the Government's case, and after conference at the bench and testimony taken out of the presence of the jury the Court sustained defense counsel's objection to any questioning of the defendant regarding the said statement.

Whereupon, the Assistant United States Attorney advised the Court that he wished to question the defendant regarding a statement made at the Coroner's inquest. Defense counsel objected to the defendant being questioned regarding this statement on the grounds that the defendant was without counsel at the inquest. The Court permitted the Assistant United States Attorney to make inquiry of the defendant for impeachment purposes and overruled objection of counsel for the defense and allowed an exception.

Witness further testified that he did not suspect Brown of playing around with his wife. Admitted he testified at the Morgue and was advised that he did not have to testify if he did not wish to. Questioned by Assistant United States Attorney as to whether or not he did not testify at the Morgue: "I walked in. Brown and my wife were lying across the bed; he was lying on top of her. His gun was over on the dresser. I reached for the gun and I jumped up and I got it before he did and he ran out the door and my wife she jumped up and grabbed me and in the tussle she jumped up and grabbed me. Did you or did you not make that statement before the Coroner?" To this question witness answered "I did." Mr. Ingoldsby then asked "Do you state now that you did not fire at Brown as you went out the door?" Witness replied "I did not." Witness further testified that his wife was dressed in a blue uniform; that his wife was shot two or three times; that he did not know whether his wife got hit by any of the shots that were fired up the stairs; that he did not see anybody at the bottom of the stairs; that he shot downstairs because they were shooting at him; that he fired both shots without looking

down the staircase; that the only reason he shot was because he thought Brown was shooting at him; that he did not hear the motor-cycle arrive; that he did not make the statement "If you want me coppers, come up and get me."

Witness testified on redirect examination that he was arrested Saturday night; that the Morgue hearing was on Monday and he had not talked to any lawyer prior to his testimony at the Morgue; that he did not remember what the Coroner said to him before he made the statement; that his testimony at the Morgue was substantially the same as it was before the Court.

Whereupon the defense rested.

The Government called as a rebuttal witness ESTELLE RUTH HOWARD, who testified that she was living at 616 21st Street, NE., on the 8th of May 1943 and was acquainted with Charles Brown; that she was on her front porch washing windows around 5 o'clock when she saw Charles Brown and heard some shooting; that five or six minutes elapsed from the time she last saw Charles Brown until she heard the shooting; that she saw Charles Brown when he came in from down town and talked to him for about ten minutes between 12:30 and 1 o'clock; that she saw Brown after most of the shooting had been over; that she was in her house when the first shot was fired; that about five minutes elapsed between the last time she saw Brown and the time she went in the kitchen.

MATTIE WRIGHT was called by the Government as a rebuttal witness and after being duly sworn testified that on the 8th day of May 1943 she was living at 615 21st Street, NE.; that she was acquainted with Charles Brown; that she came home about 5:15 and Charles Brown was on his porch washing the furniture at that time; that she talked to him for about five or ten minutes before any shots were fired, and fixed the time that she last talked to him at around 5:20 to 5:25. Witness testified she was in her living room at the time she was talking to him; that Brown was on his front porch 29 minutes of 6 o'clock; that she had arranged to go down town with Brown at 6 o'clock; that she heard shots fired. Counsel for the defendant objected to the Assistant United States Attorney leading the witness. Objection was sustained. Witness further testified that she talked to Brown five or ten minutes before the

first shot was fired; that she left the window and went to the front door and saw Brown and he was going up the street.

Whereupon the Government called MRS. EMMA BROWN in rebuttal, and after being first duly sworn, she testified that she was Charles Brown's grandmother and lived at 617 21st Street, NE., and was the owner of the house; that she heard some shots fired on May 8, 1943; that she was in her kitchen; that she saw her grandson, Charles Brown, shortly before the first shooting; that he was washing and cleaning the front porch; that she saw Brown ten minutes before the first shot was fired; that if he had gone in the house, she would have been in a position to see Brown. After the first shot she next saw Brown entering the front door; that Brown ran up the steps and told her to get out; that Brown pushed her out; that she did not recall whether Brown went next door with her.

On Cross-examination witness could not say that she had discussed the case with Brown since it happened.

Defense again made a motion for a directed verdict and the motion was denied. Exception allowed. Whereupon, counsel for both sides argued and the Court charged the jury. No objection to the charge of the Court by defense or prosecution.

STATUTES INVOLVED

D. C. CODE (1940), Section 22–2401:

> Whoever, being of sound memory and discretion, kills another purposely, either of deliberate and premediated malice or by means of poison, or in perpetrating or attempting to perpetrate any offense punishable by imprisonment in the penitentiary, or without purpose so to do kills another in perpetrating or in attempting to perpetrate any arson, as defined in section 22–401 or 22–402 of this Code, rape, mayhem, robbery, or kidnapping, or in perpetrating or in attempting to perpetrate any housebreaking while armed with or using a dangerous weapon, is guilty of murder in the first degree.

U. S. CODE (1934), Title 18, Section 595:

> It shall be the duty of the marshal, his deputy, or other officer, who may arrest a person charged with any

crime or offense, to take the defendant before the nearest United States commissioner or the nearest judicial officer having jurisdiction under existing laws for a hearing, commitment, or taking bail for trial, and the officer or magistrate issuing the warrant shall attach thereto a certified copy of the complaint, and upon the arrest of the accused, the return of the warrant, with a copy of the complaint attached, shall confer jurisdiction upon such officer as fully as if the complaint had originally been made before him, and no mileage shall be allowed any officer violating the provisions hereof.

D. C. CODE (1940), Section 11–1205:

Witnesses may be summoned and compelled by the coroner to attend before him and give evidence, and shall be liable in like manner as if the summons had been issued by the municipal court. And it shall be his duty, upon every inquisition taken before him, where any person is charged with having unlawfully caused the death of the person on whom the inquest is held, to reduce the testimony of the witnesses to writing, and if the jury find that murder or manslaughter has been committed on the deceased, he shall require such witnesses as he thinks proper to give a recognizance to appear and testify in the District Court of the United States for the District of Columbia, and shall return to said court the said inquisition and testimony and recognizance by him taken.

D. C. CODE (1940), Section 11–1208:

Whenever the marshall is a party to any cause or interested therein, or it is unfit on other grounds that he should serve and execute the process to be issued therein, such process shall be issued to the coroner, and he shall be paid the same fees and compensation for serving and executing the same which would be payable to the marshal in similar cases, and shall account therefor to the treasury of the United States. And if he shall fail in the proper performance of his duties in the premises, like redress may be had against him, his sureties, and

his and their heirs, devisees, and personal representatives, as could have been had against the marshal, his sureties, and his and their heirs, devisees, and personal representatives, for a like failure on the part of said marshal.

U. S. CODE (1934), Title 5, Section 300a:

The Director, Assistant Directors, agents, and inspectors of the Division of Investigation of the Department of Justice are empowered to serve warrants and subpoenas issued under the authority of the United States; to make seizures under warrant for violation of the laws of the United States; to make arrests without warrant for felonies which have been committed and which are cognizable under the laws of the United States, in cases where the person making the arrest has reasonable grounds to believe that the person so arrested is guilty of such felony and where there is a likelihood of the person escaping before a warrant can be obtained for his arrest, but the person arrested shall be immediately taken before a committing officer. Such members of the Division of Investigation of the Department of Justice are authorized and empowered to carry firearms.

ISSUES

The government in the argument which follows has answered the following issues raised by appellant's brief:

1. That the court erred in permitting the Assistant United States Attorney to impeach the defendant's testimony by questioning him concerning statements which were made by him at the time of the coroner's inquest.

2. That the trial court erred in refusing to withdraw a juror at the request of defense counsel and declare a mistrial when the Assistant United States Attorney asked a leading question regarding the location of a gun holster.

3. That the trial court erred in failing to direct a verdict upon the completion of the government's case as to the first degree count, and again at the close of the entire case.

SUMMARY OF ARGUMENT

I

The trial court properly permitted the Assistant United States Attorney to question the appellant concerning a statement which he made at the coroner's inquest, first because the coroner has the power of a committing magistrate, both at common law and under the D. C. Code, and secondly because the construction placed upon Title 18, Section 595 of the United States Code in the case of *McNabb* v. *United States,* 318 U. S. 332 (1943), dealt with the question of the voluntary nature of the statement rather than the failure to take an individual before a United States commissioner or other committing magistrate promptly and without delay.

II

The trial court did not err in refusing to withdraw a juror and declare a mistrial when a leading question regarding the location of a gun holster was asked by the Assistant United States Attorney, because a fair reading of the record clearly shows that the court ruled the question to be leading and refused to allow the Assistant United States Attorney to rephrase the question and put it in other than a leading form.

III

A reading of the transcript of proceedings in the trial court clearly shows that all the elements necessary to a conviction for first degree murder were present in this case and were brought out by the testimony of the witnesses during the trial.

ARGUMENT

I

Statement made before the coroner properly admitted to impeach appellant

It is the contention of the appellant that after his arrest he was not immediately taken before a committing officer pursuant to the provisions of 5 U. S. C. § 300a, nor was he taken before a commissioner or other judicial officer for a hearing, commit-

ment, or taking bail for trial pursuant to 18 U. S. C. § 595. However, the record indicates that appellant was arrested between 5:30 and 6:00 p. m., on Saturday, May 8, 1943, and that he was confined in the police precinct until Monday, May 10, 1943, when he was taken to the District of Columbia Morgue for an inquest. It was at that time that he made a statement, after the coroner had informed him of his rights and advised him that he was not required to make any statement, and that if he did make a statement it could be used against him in a subsequent proceeding if such became necessary. The contention of the appellant in this regard appears to be that the coroner for the District of Columbia is not a committing officer in the sense used in 5 U. S. C. § 300a, or a commissioner or judicial officer having jurisdiction under existing law as used in 18 U. S. C. § 595. The most recent construction of these two sections is found in *McNabb* v. *United States,* 318 U. S. 332, where the practice of detaining prisoners without a hearing and subjecting them to prolonged questioning was condemned. This decision was based upon substantial injustices to the prisoner rather than the meticulous enforcement of these two statutory directives to arresting officers. In the present case the office of committing magistrates and other judicial officers were closed at the time the appellant was arrested, and the earliest opportunity for taking him before a committing magistrate or judicial officer was the following Monday morning. This was done and the appellant therefore has no ground for complaint based upon the lapse of time between his arrest and his hearing. He now bases his complaint on the ground that the coroner was not the proper officer before whom he should have been taken. But, it is the position of the government that at common law and under local statutes, the coroner is both a judicial officer and a committing magistrate. BLACKSTONE in VOLUME 1 at page 297 states that the coroner is to select a jury to inquire into the cause of death, and he then states:

> If any be found guilty by this inquest, of murder or other homicide, he is to commit them to prison for further trial.

And the D. C. Code (1940) § 11–1205 authorizes the coroner to require witnesses to give a recognizance for their appearance in the District Court. Surely he has no less control over the accused than he has over witnesses to the crime. Or to put it differently, the accused himself is a witness.

A coroner has variously been held in the State courts to be a judicial officer, a quasi-judicial officer, or a non-judicial officer depending upon the statutes involved and the particular acts which were being construed. Therefore there is little authority for the construction of our local statutes governing the duties of the coroner's office. However, in *People* v. *Jackson,* 191 N. Y. 293, 84 N. E. 65 (1908), under a statute somewhat different from our local statute governing the coroner, a coroner was held to be a judicial officer and indictable under a New York statute, making it criminal for a judicial officer to accept a bribe. In *Commonwealth ex rel. Kelley* v. *Warden of the Jail,* 41 York 82 (Pa.), a coroner's inquest was held to be a judicial proceeding and in *Kelly* v. *Shafer,* 213 Iowa, 792, 239 N. W. 547 (1931), a coroner's inquest was held to be a quasi-judicial proceeding.

It will be noted that the testimony of the defendant at the trial and his testimony at the morgue about which he was questioned for impeachment purposes both were of an exculpatory nature. Accordingly the case of *Wood and Wolf* v. *United* States, 75 App. D. C. 274 (1942), 128 F. (2d) 265, is not applicable. See *Mumforde* v. *United States,* 76 App. D. C. 107 (1942), 130 F. (2d) 411. See also *Wilson* v. *United States,* 162 U. S. 613 (1895).

II

Trial court refused to withdraw a juror and declare mistrial when leading question was asked by prosecuting attorney

Officer Arthur Trammelle, while giving his testimony on direct examination, was asked by the Assistant United States Attorney, "Did you notice that gun holster on the dresser at the time you first went to the second floor?" While this question was asked the Assistant United States Attorney pointed to a gun holster shown in government exhibit No. 9, which was a picture of the bedroom occupied by Charles Brown. Defense counsel objected to this question and the objection

was sustained. The Assistant United States Attorney then attempted to rephrase the question so as not to make it objectionable. Defense counsel objected to this and the court sustained the objection, stating that inasmuch as the answer had been suggested to the witness, the court would permit no further inquiry concerning the location of the gun holster. That line of questioning was not pursued further by the Assistant United States Attorney with the witness Trammelle.

Later Charles C. Carver, a detective attached to the Metropolitan Police Department, testified that he went to the premises, 617 21st Street NE., on May 8, 1943, at about 6:00 o'clock in the evening. He was then asked to describe what he saw in the rooms on the second floor of 617 21st Street, NE. No objection was made to this question and the officer proceeded to enumerate what he had seen. Contained in his enumeration was the gun holster about which Officer Trammelle had been questioned earlier in the day.

Inasmuch as the objectionable question was disallowed and the Assistant United States Attorney was forbidden to rephrase the question or to pursue the matter further in questioning Officer Trammelle, and inasmuch as the objectionable question was never answered by Officer Trammelle, it is difficult to see how appellant was injured in any way.

III

The testimony of the government witnesses taken as a whole clearly shows the appellant to be of sound memory and discretion and that he purposely and with deliberate and premeditated malice did kill the Police Officer Charles Johnston, and that the trial court properly exercised its discretion in denying a motion for a verdict of not guilty of first degree murder.

CONCLUSION

The government submits that the whole of the record in this case fully substantiates the conclusion that the appellant received a fair and impartial trial; that he was properly convicted. All of the contentions raised by the appellant's brief have been answered in the government's brief, with the exception of ap-

pellant's argument regarding the Assistant United States Attorney's line of questioning concerning the ability of the witness to make certain observations through a mirror located in a bedroom at the house at 617 21st Street, NE., because this is a discretionary matter with the trial court[1] and is without merit which would justify argument in this brief. It is respectfully submitted, therefore, that the verdict of the jury was proper and the judgment of the lower court should be affirmed.

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[1] A. L. R. 24 and 85 A. L. R. 482. "The admission of evidence of experiments, or permitting them to be performed in court, is a matter peculiarly within the discretion of the trial judge, and this discretion will not be interferred with unless it be apparent that it has been abused."

8 A. L. R. 18 and 85 A. L. R. 480. "The general rule is that to render experiments permissible, or to admit evidence of experiments made out of court, the conditions need not be identical with those existing at the time of the occurrence, but that it is sufficient if there is a substantial similarity."

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